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11 Attorneys for Defendant,
12 RASH CURTIS & ASSOCIATES

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA

15 BOSCO KANTE,

16 Plaintiff,

17 v.

18 RASH CURTIS & ASSOCIATES,

19 Defendants.

Case No.: 3:16-cv-05807-EDL

**DEFENDANT RASH CURTIS AND
ASSOCIATES' NOTICE OF MOTION AND
MOTION TO DISMISS PURSUANT TO
RULE 12(b)(5)**

**DATE: DECEMBER 20, 2016
TIME: 9:00 A.M.
CRTRM: E – 15TH FLOOR**

**HON. MAG. JUDGE ELIZABETH D.
LAPORTE**

20 **NOTICE OF MOTION**

21 TO PLAINTIFF:

22 NOTICE IS HEREBY GIVEN that on December 20, 2016 at 9:00 a.m. in Courtroom E – 15th
23 Floor, in the above entitled Court located at 450 Golden Gate Avenue, San Francisco, California
24 94102, Defendant Rash Curtis & Associates will, and hereby does, move this Court for an order
25 dismissing each and every claim or cause of action pled in Plaintiff Bosco Kante's complaint pursuant
26 to Federal Rules of Civil Procedure, Rule 12(b)(5).
27

1 This motion to made on the grounds that Plaintiff has failed to properly serve Defendant with
2 both the summons and complaint as requirement by Federal Rules of Civil Procedure, Rule 4(c)(1).

3 **REQUEST FOR RELIEF**

4 Defendant Rash Curtis & Associates hereby requests that this Court dismiss Plaintiff Bosco
5 Kante's Complaint against it and each and every claim therein, with prejudice, as Plaintiff has failed to
6 properly service Defendant with the summons and complaint.

7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 **I. INTRODUCTION**

9 Defendant Rash Curtis & Associates brings this instant Motion to Dismiss pursuant to Federal
10 Rules of Civil Procedure, Rule 12(b)(5) to resolve a single, relatively simple, issue – *to wit* – whether
11 Defendant was properly served with the summons and complaint by Plaintiff in accordance with
12 FRCP, Rule 4. If Defendant was not properly served with the summons and complaint, this Court
13 lacks personal jurisdiction over Defendant, and the motion to dismiss should be granted. *See, e.g.,*
14 *Direct Mail Specialists, Inc. V. Eclat Computerized Technologies*, 840 F.2d. 685, 687 (9th Cir. 1988).

15 As discussed *infra*, and in the accompanying declaration of Bob Keith in support hereof, it is
16 clear that Defendant was not properly served with both the summons and complaint as required under
17 FRCP, Rule 4(c)(1). (Declaration of Bob Keith ("Keith Decl.") ¶3.) Accordingly, Defendant's motion
18 should be granted.

19 **II. ARGUMENT**

20 **A. Standard of Review.**

21 A motion to dismiss challenging the sufficiency of the manner of service is proper under
22 Federal Rule of Civil Procedure, Rule 12(b)(5). FRCP, Rule 12(b)(5); Wagstaffe, *Cal. Prac. Guide:*
23 *Fed. Civ. Proc. Before Trial*, ¶5:347 (Rutter Group 2016 rev.).

24 It is black letter law that a summons and copy of the complaint must be served together in
25 order for service to have been properly effectuated upon a defendant. FRCP, Rule 4(c)(1) ["A
26 summons must be served with a copy of the complaint. The plaintiff is responsible for having the
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1 summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary
2 copies to the person who makes service.”].

3 Substantial compliance with FRCP, Rule 4(c) is required. *Bonita Packing Co. v. O’Sullivan*,
4 165 F.R.D. 610, 612(C.D.Cal. 1995). As the *Bonita* Court summed up:

5 A federal court does not have jurisdiction over a defendant unless the
6 defendant has been properly served [with the summons and complaint]
7 under Fed.R.Civ.P. 4...[W]ithout substantial compliance with Rule 4
8 neither actual notice or simply naming the defendant in the complaint will
provide personal jurisdiction. *Direct Mail Specialists, Inc. v. Eclat*
Computerized Technologies, 840 F.2d. 685, 687 (9th Cir. 1988).

9 *Bonita Packing, supra*, 165 F.R.D. at 612-613.

10 Service of a summons without a copy of the complaint is insufficient to secure jurisdiction over
11 a defendant, even for pro per plaintiffs. *Albra v. Advan, Inc.*, 490 F.3d. 826, 829 (11th Cir. 2007) [pro
12 per plaintiff failed to properly effect service upon defendant may only serving a copy of the summons].

13 A corporation, as is Defendant here, is only properly served with the summons and complaint
14 where a copy of the summons and complaint have been served to an appointed agent of Defendant to
15 receive service of process. FRCP, Rule 4(e)(1); Rule 4(h); Cal. Civ. Code § 416.10.

16 Here, On October 11, 2016, Defendant was served with only a summons by Plaintiff and/or
17 Plaintiff’s process server. (Keith Decl. ¶3.) Plaintiff and/or his process server never served Rash Curtis
18 with a copy of the complaint. (*Ibid.*) Defendant never waived service of process. (*Id.* at ¶5.)

19 Accordingly, Defendant was not properly served in accordance with FRCP, Rule 4 as it was not
20 served with the summons and complaint.

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III. CONCLUSION

Pursuant to the foregoing, Defendant Rash Curtis & Associates requests that Plaintiff Bosco Kante's Complaint be dismissed as Defendant was not properly served with both the summons and the complaint as required. *See* FRCP, Rule 4(c)(1) ["A summons must be served with a copy of the complaint."].

Dated: November 1, 2016

ELLIS LAW GROUP LLP

By /s/ Amanda N. Griffith
Amanda N. Griffith
Attorney for Defendant,
RASH CURTIS & ASSOCIATES

CERTIFICATE OF SERVICE

I, Roxy A. Chipak, declare:

I am a citizen of the United States, am over the age of eighteen years, and am not a party to or interested in the within entitled cause. My business address is 740 University Avenue, Suite 100, Sacramento, CA 95825.

On November 1, 2016, I served the following document(s) on the parties in the within action:

DEFENDANT RASH CURTIS AND ASSOCIATES NOTICE OF MOTION AND MOTION TO DISMISS PURSUANT TO RULE 12b(5)

X

BY MAIL: I am familiar with the business practice for collection and processing of mail. The above-described document(s) will be enclosed in a sealed envelope, with first class postage thereon fully prepaid, and deposited with the United States Postal Service at Sacramento, CA on this date, addressed as follows:

Bosco Kante
465 Canyon Oaks Drive, Apt. F
Oakland, CA 94605

Plaintiff in Pro Per

I declare under penalty of perjury under the laws of the State of California that the foregoing is a true and correct statement and that this Certificate was executed on November 1, 2016.

By: 

Roxy A. Chipak